

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In Re Subpoena for Documents,)	2:18-mc-00062 RSL
)	
eNOM, INC.,)	MOTION TO QUASH
)	SUBPOENA FOR DOCUMENTS
Subpoenaed Party,)	
)	Note for: 29 June 2018
Unnamed Domain Owner,)	
)	(Oral argument requested)
Movant.)	
)	

STATEMENT OF MOTION

Movant Unnamed Domain Owner moves to quash a non-party subpoena issued out of the U.S. District Court for the Western District of Virginia in civil case No. 3:17-cv-00072-NKM (filed Oct. 11, 2017), captioned *Sines, et al v. Kessler, et al*. The subpoena was issued at the request of one of the defendants in that case, Michael Peinovich. (Exhibit A "Subpoena"). The first amended complaint in this underlying case is attached as Exhibit B (the "Complaint") to this motion.

BACKGROUND

The case in *Sines, et al v. Kessler, et al* arises out of the violent white nationalist "Unite the Right" gathering that took place in Charlottesville, Virginia on August 11 and 12, 2017. Plaintiffs in the litigation are individuals seriously injured

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1 by white nationalists during the events of August 11 and 12, including one plaintiff
2 who suffered a stroke as a result of his injuries, and two plaintiffs who were struck by
3 a car in the car attack that killed anti-racist counter-protester Heather Heyer, and
4 seriously injured at least 19 other people. Defendants in the case are twenty-five
5 individuals and organizations who were the key organizers of and participants in the
6 Unite the Right rally, along with a number of unnamed co-conspirators. The
7 Complaint alleges that defendants “conspired to plan, promote, and carry out the
8 violent events in Charlottesville” (Ex. B ¶ 3), and seeks money damages and
9 injunctive relief.
10

11 The subpoena at issue in this motion to quash was issued by one of the *pro se*
12 Defendants in the case Michael “Enoch” Peinovich. Defendant Peinovich, who self-
13 identifies as a white nationalist or ethno-nationalist, was one of the most prominent
14 organizers of the Unite the Right event, and was advertised as a speaker for the event.
15 He is the creator of the popular neo-Nazi blog and website The Right Stuff, is a co-
16 host of the white nationalist Daily Shoah podcast, and is a frequent speaker at white
17 nationalist and neo-Nazi events around the country. (Ex. B ¶ 42).
18

19 At Defendant Peinovich’s request, the clerk’s office in the Western District of
20 Virginia issued the subpoena challenged here. The subpoena was issued to eNom,
21 Inc., a domain name registrar and Web hosting company headquartered in Kirkland,
22 Washington (eNom). The subpoena seeks “[c]ommunications, documents, and
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MOTION TO QUASH SUBPOENA-2

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1 [electronically stored information] sufficient to identify the persons, including
2 entities, that have presently registered or ever in the past registered” two website
3 domains.

4 Movant in the instant matter is the owner of one of the domains targeted by
5 the subpoena. (eNom has informed Defendant Peinovich that the second domain is
6 not actually registered with eNom, but is registered through a different company.
7 (Exhibit C “Declaration of Counsel”). Pursuant to its subpoena policy, eNom has
8 provided Movant with notice of the subpoena in order to give Movant sufficient time
9 to challenge its validity. eNom has represented to Movant that it will not comply
10 with the subpoena pending the outcome of this motion to quash. (Exhibit C
11 Declaration of Counsel).

12 ARGUMENT

13 A. MOVANT HAS STANDING TO BRING THIS MOTION TO QUASH

14 An individual has personal right in information in his or her profile and inbox
15 on social networking site and his or her webmail inbox in same way that individual
16 has personal right in employment and bank records; as with bank and employment
17 records, this personal right is sufficient to confer standing to move to quash subpoena
18 seeking such information under Fed. R. Civ. P. 45. *Crispin v. Christian Audigier,*
19 *Inc.*, 717 F. Supp. 2d 965, 974 (C.D. Cal. 2010).

20 As argued below, the movant has first amendment privilege to anonymous
21 speech. To the extent that the subpoena ultimately seeks the identities of anonymous

22 MOTION TO QUASH SUBPOENA-3

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1 contributors of the movant's online news service, the movant also has a first
2 amendment privilege to shield its sources. See, *O'Grady v. Superior Court*, 139 Cal.
3 App. 4th 1423, 1468 (2006). Also argued below, the Stored Communications Act
4 prohibits the use of a civil discovery subpoena for the information sought.

5
6 B. THE WESTERN DISTRICT OF WASHINGTON IS THE PROPER
7 TRIBUNAL FOR OBJECTION TO THE SUBPOENA.

8 The Federal Rules were significantly amended in 2013 to clarify and simplify
9 Rule 45 subpoenas. The Rules now require all subpoenas to be issued from the
10 district court where the action is pending. See, Fed. R. Civ. P. 45(a)(2). However, in
11 the case of discovery subpoenas to non-parties, the primary forum for resolving
12 motions to quash or modify is the district court for the "district where compliance is
13 required" Fed. R. Civ. P. 45(d)(2)(B)(i). That court has primary responsibility for
14 modifying, quashing, or enforcing subpoenas directed to persons within its
15 jurisdiction under Rule 45(c), which sets certain geographic limits. See, *Ellis v.*
16 *Arrowood Indem. Co.*, 2014 WL 4365273, at 2 (S.D. W. Va. Sept. 2, 2014); Fed. R.
17 Civ. P. 45(f), advisory committee's note to 2013 amendment ("Subpoenas are
18 essential to obtain discovery from nonparties. To protect local nonparties, local
19 resolution of disputes about subpoenas is assured by the limitations of Rule 45(c) and
20 the requirements in Rules 45(d) and (e) that motions be made in the court in which
21 compliance is required under Rule 45(c).").

22 In this case, the subpoenaed entity, eNom Inc., is headquartered and has its
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24 MOTION TO QUASH SUBPOENA-4
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1 primary place of business at 5808 Lake Washington Blvd. NE, Suite 201 Kirkland,
2 WA 98033. (Ex. A Subpoena). Therefore, the proper compliance district is the
3 United States District Court for the Western District of Washington.

4 The subpoenaing party designated "PO Box 1069 Hopewell Junction, NY
5 12533" as the place of compliance. Notwithstanding that ineffective designation, the
6 real place of compliance is the district in which the subpoenaed party is located.
7

8 C. THE SUBPOENA MUST BE QUASHED BECAUSE IT COMMANDS
9 COMPLIANCE MORE THAN 100 MILES FROM WHERE THE
10 SUBPOENAED ENTITY RESIDES, IS EMPLOYED, OR REGULARLY
TRANSACTS BUSINESS.

11 Rule 45(d)(3)(A) states, "On timely motion, the court for the district where
12 compliance is required must quash or modify a subpoena that ... (ii) requires a
13 person to comply beyond the geographical limits specified in Rule 45(c). In the case
14 of subpoenas requesting documents or tangible things, the subpoena may only
15 command "production" of documents, ESI, or tangible things at a place within 100
16 miles of where the subpoena recipient resides, is employed or regularly transacts
17 business in person. See, Fed. R. Civ. P. 45(c)(2)(A).
18

19 The court may take judicial notice that a post office box in Hopewell Junction,
20 New York is more than 100 miles from 5808 Lake Washington Blvd. in Kirkland,
21 Washington.
22

23 This rule is a mandatory, non-waivable defect. It applies regardless of whether
24 compliance by electronic or U.S. mail is requested. Consequently, the subpoena must
25 MOTION TO QUASH SUBPOENA-5
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1 be quashed.

2 D. THE SUBPOENA MUST BE QUASHED BECAUSE OF DEFECTIVE
3 SERVICE.

4 The 2013 amendment to Rule 45 clarified that a subpoena may be served at
5 any place within the United States. However, a subpoena may not be served by a
6 party to an action. Fed Rule Civ. R 45(b)(1).

7 Movant received notice of this subpoena from counsel for eNom, who stated
8 that they received service from Michael Peinovich by electronic mail on eNom to
9 legal@enom.com. (Ex. C Declaration of Counsel ¶ 7).

10
11 Additionally, a subpoena served on a non-party witness must be served on all
12 parties to action. *Callanan v. Riggers & Erectors*, 149 F.R.D. 519 (D.V.I. 1992). The
13 movant is not aware of any proof of service filed with that court. As of June 5, 2018,
14 examination of the court docket in case *Sines et al v. Kessler et al* 3:17-cv-00072-
15 NKM-JCH did not reveal and proof of service filed in relation to this subpoena.

16
17 Furthermore, the use of a post office box as the compliance location is a suspect
18 practice because, among other reasons, it frustrates service of legal process, such as
19 this motion to quash.

20
21 E. THE SUBPOENA WAS NOT ISSUED IN GOOD FAITH.

22 The subpoena does not seek information that is relevant to the underlying
23 litigation. Rather, the Movant is informed and believes that Peinovich will seek to
24 publish or disseminate private information obtained through the subpoena in an

25 MOTION TO QUASH SUBPOENA-6
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1 attempt to harass and attack people associated with the targeted domains. The
2 subpoenaing party is a blogger and founder of the podcast The Daily Shoah and alt-
3 right media hub The Right Stuff, founded on a core principle of ethno-nationalism.
4 (Ex. D The Guardian- Making Sense of the Alt Right p. 2). Movant believes that
5 Peinovich seeks to publish private information of its users so that they may be
6 exposed to a “troll storm.”
7

8 Peinovich is publicly associated with co-defendant Richard Spencer; alleged
9 in the complaint as the head of a white nationalist “think tank,” the National Policy
10 Institute, founder of the online publication called altright.com, and proponent of
11 “ethnic cleansing.” The complaint alleges that on Friday, Aug 11, 2017, Spencer was
12 a leader of a violent torchlight rally and headline speaker of the “Unite the Right” the
13 right rally the following day. (Ex. B Complaint ¶ 22). On August 12, violence broke
14 out and became so severe that the police declared an unlawful assembly before the
15 official start time of the rally. Another co-defendant in the litigation, James Alex
16 Fields, Jr., drove a Dodge Challenger into a crowd of protesters, injuring dozens and
17 killing a 32-year old Heather Heyer. (Ex. B Complaint ¶ 24). Peinovich and Spencer
18 have shared the stage on multiple occasions and Spencer is a frequent contributor to
19 Peinovich’s podcast, *The Daily Shoah*.
20
21

22 Andrew Anglin, founder and operator of the neo-Nazi website the Daily
23 Stormer is also a co-defendant in this matter the case. The Daily Stormer has called
24 its website the “world’s most genocidal” website and is named after Der Stürmer, a
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26 MOTION TO QUASH SUBPOENA-7

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1 Nazi propaganda tabloid Anglin and his associates at Daily Stormer, including
2 Defendant Robert "Azzmador" Ray, use Daily Stormer's website "as a hardcore front
3 for the conversion of masses into a pro-white, Anti-semitic ideology," to "sell []
4 global white supremacy," and to "make a racist army." The website was the most
5 visited hate site on the Internet in 2016. (Ex. B Complaint ¶ 26).

7 The Daily Stormer orchestrates the activity of a so called "troll army", which
8 seeks to and does overwhelm adversaries with inflammatory and provocative online
9 conduct. These efforts often include doxing: de-anonymizing and publicizing
10 personal details of online users. Such doxing exposes targets to real world threats of
11 stalking, harassment, and physical danger. (Ex. E The Intercept- How Right Wing
12 Extremists Stalk, Dox, and Harass their Enemies). Anglin and other Daily Stormer
13 associates face numerous allegations in multiple lawsuits concerning doxing and
14 trolling. Following a dispute, between Richard Spencer's mother and local real estate
15 agent in their hometown of Whitefish, Mo., Anglin published the personal
16 information of the Realtor and other prominent Jewish leaders in town and called on
17 his "stormers" to come to the defense of the Spencers. (Ex. F NPR- Descending on a
18 Montana Town).

21 More recently, Anglin has been sued by American University's student body
22 president for allegedly directing the Daily Stormer's readers to troll storm her with a
23 barrage of racist and demeaning messages. (*Dumpson v. Ade et al.* 1:18-cv-01011
24 (D.D.C. 2018). Last year, American University elected its first African American
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26 MOTION TO QUASH SUBPOENA-8

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1 student body president. Following the election, the Daily Stormer called on readers to
2 “troll” the new president. The day after her inauguration, a masked man hung
3 bananas from nooses on American University’s campus, displaying racially-charged
4 and threatening messages targeting Ms. Dumpson and her historically black sorority.
5 Other lawsuits and claims against Anglin contain similar allegations.
6

7 Another co-defendant in the case, Christopher Cantwell, also conducts
8 campaigns of online harassment, intimidation, and threats against political
9 adversaries. A separate pending matter in the Western District of Virginia
10 documents allegations about Cantwell’s efforts to incite harassment campaigns
11 against two anti-racist protesters who are cooperating witnesses for the prosecution in
12 a pending criminal case against him for unlawful deployment of pepper spray at the
13 torch rally on August 11. See *Cantwell v. Gorcenski, et al*, Case No. 3:17-cv-00089-
14 NKM/JCH (W.D. Va., filed Dec. 28, 2017). The counterclaims in that case allege
15 that Cantwell’s online followers have published one witness’ home address multiple
16 times in an attempt to encourage physical violence against her. This conduct also
17 allegedly included an attempt at “swatting” a witness. (Making a false police report,
18 usually of an urgent or violent crime in progress, with the intention of luring law
19 enforcement or SWAT to the victim’s address in an effort to harass, intimidate,
20 injure, or kill the targeted individual). *Cantwell* 3:17-cv-00089-NKM/JCH ¶ 36.
21 Defendant Peinovich is publicly associated with Defendant Cantwell, and has
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MOTION TO QUASH SUBPOENA-9

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1 appeared as a guest on Cantwell's white nationalist podcast, "The Radical Agenda".
2 See "Radical Agenda Ep. 302—Mike Enoch," available at
3 https://archive.org/details/youtube-aSz_L1WZS7w (accessed June 6, 2018).

4 Movant believes that any information gathered by Peinovich through the
5 subpoena will be used to orchestrate similar campaigns to harass, intimidate, and
6 threaten Movant and individuals associated with the Movant. The subpoena is not a
7 legitimate effort to obtain relevant evidence. Rather, it is an effort to abuse the
8 discovery process to deanonymize an adversarial online news source and expose its
9 users to harassment, trolling, doxing, and other forms of intimidation. This online
10 targeting presents a clear and present danger of real world harmful threats.

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12
13 F. THE SUBPOENAING PARTY CANNOT OVERCOME THE MOVANT'S
14 FIRST AMENDMENT RIGHT TO ANONYMOUS SPEECH.

15 In *Anonymous Online Speakers v. United States Dist. Court*, the Ninth Circuit
16 instructed on anonymous speech and the First Amendment in the context of online
17 activity:

18 First Amendment protection for anonymous speech was first articulated a half-
19 century ago in the context of political speech, *Talley v. California*, (1960),
20 but... harkened back to "a respected tradition of anonymity in the advocacy of
21 political causes." *McIntyre v. Ohio Elections Comm'n*. Undoubtedly the most
22 famous pieces of anonymous American political advocacy are The Federalist
23 Papers, penned by James Madison, Alexander Hamilton, and John Jay, but
24 published under the pseudonym "Publius." Their opponents, the Anti-
25 Federalists, also published anonymously, cloaking their real identities with
26 pseudonyms such as "Brutus," "Centinel," and "The Federal Farmer." It is now
settled that "an author's decision to remain anonymous, like other decisions
concerning omissions or additions to the content of a publication, is an aspect
of the freedom of speech protected by the First Amendment."

MOTION TO QUASH SUBPOENA-10

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1 Although the Internet is the latest platform for anonymous speech, online
2 speech stands on the same footing as other speech—there is "no basis for
3 qualifying the level of First Amendment scrutiny that should be applied" to
4 online speech. As with other forms of expression, the ability to speak
5 anonymously on the Internet promotes the robust exchange of ideas and allows
6 individuals to express themselves freely without "fear of economic or official
7 retaliation . . . [or] concern about social ostracism." (Citations Omitted)

8 (*In re Anonymous Online Speakers*), 661 F.3d 1168, 1172-1173 (9th Cir. 2011). The
9 Ninth Circuit considered that a higher standard should apply when a subpoena seeks
10 the identity of an anonymous internet user who is not a party to the underlying
11 litigation. 661 F.3d 1168, 1176, *citing*, *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d
12 1088, 1095 (W.D. Wash. 2001) (noting that identification is only appropriate where
13 the compelling need for discovery outweighs the First Amendment right of the
14 speakers because litigation may continue without disclosure of the speakers'
15 identities); *accord*, *Sedersten v. Taylor*, 2009 U.S. Dist. LEXIS 114525, 2009 WL
16 4802567 (W.D. Mo. Dec. 9, 2009); *Enterline v. Pocono Med. Ctr.*, 751 F. Supp. 2d
17 782, (M.D. Pa. Dec. 11, 2008). In *Anonymous Online Speakers v. United States Dist.*
18 *Court*, the Ninth Circuit ultimately went on to hold that it was not error for the district
19 court to use the most exacting standard of *Doe v. Cahill*, 884 A.2d 451 (Del. 2005)
20 ([subpoenaing party] must be able to survive a hypothetical motion for summary
21 judgment and give, or attempt to give, notice to the speaker before discovering the
22 anonymous speaker's identity). 661 F.3d 1168, 1179 (9th Cir. 2011).

23 MOTION TO QUASH SUBPOENA-11
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1 This Court's opinion in *Doe v. 2TheMart.com, Inc.* (W.D. WA 2001) 140 F.
2 Supp. 2d 1088, provides the clearest guide for protecting the First Amendment rights
3 of non-party anonymous speakers. The Court established a four-part test:

- 4 1. The subpoena seeking the information was issued in good faith and not for
5 an improper purpose;
- 6 2. The information sought relates to a core claim or defense;
- 7 3. The identifying information is directly and materially relevant to that claim
8 or defense; and
- 9 4. Information sufficient to establish or disprove that claim or defense is
10 unavailable from any other source.

11 *Supra*, 140 F. Supp. 2d, at 1091.

12
13
14 In the instant case, Defendant Peinovich seeks "communications, documents,
15 and ESI sufficient to identify the persons, including entities, that have presently
16 registered or ever in the past registered [domains of online political news service].
17 (Ex. A Subpoena, at 8). Standing alone, the subpoena utterly fails to show the
18 information sought is likely to lead to any discoverable relevant evidence. Moreover,
19 it proffers nothing to meet the First Amendment requirement for identifying
20 anonymous speakers. Arguendo, even if the subpoena somehow made a *prima facie*
21 showing, deanonymizing domain registrants would not be the least restrictive means.

22
23 Finally, to the extent that the subpoena ultimately seeks the identities of
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25 MOTION TO QUASH SUBPOENA-12
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1 anonymous contributors of the movant's online news service, the movant also has a
2 first amendment privilege to shield its sources. See, *O'Grady v. Superior Court*, 139
3 Cal. App. 4th 1423, 1468 (2006).

4 G. THE STORED COMMUNICATIONS ACT PROHIBITS DISCLOSURE OF
5 THE INFORMATION SOUGHT.

6 The Stored Communications Act prevents a private party from using a
7 discovery subpoena to obtain the information sought here. 18 U.S.C. § § 2701-2711.
8 The SCA, passed as part of the Electronic Communications Privacy Act of 1986,
9 prohibits unauthorized access of electronic communications stored with online
10 services. It also limits the ability of providers of communications and computing
11 services to disclose communications and records regarding users of such services.
12 Subsection 2702(a)(1) and (2), and subsection (a)(3) explicitly prevent, unless an
13 appropriate exception applies, the disclosure to the government by an ECS or RCS
14 provider of a customer "record" or "other information pertaining to" a subscriber or
15 customer. Subsection 2702(a) enacts a blanket prohibition on disclosure — providers
16 "shall not knowingly divulge to any person" the contents of communications or
17 records or other information pertaining to a subscriber or customer — unless they
18 meet the strict and specifically articulated exceptions.
19
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21

22 At least one case has found that use of a discovery subpoena by a non-
23 governmental entity was prohibited by the SCA. In *O'Grady v. Superior Court*, 139
24 Cal.App.4th 1423 (Cal. App. 2006), a non-government litigant issued civil subpoenas
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26 MOTION TO QUASH SUBPOENA-13

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1 to an ECS operator seeking the identity and e-mail communications of an online
 2 journalist who allegedly was in communication with a Doe defendant, the California
 3 Court of Appeals found that discovery subpoenas could not be used to obtain the
 4 material sought.

6 CONCLUSION

7 The subpoena at issue suffers from numerous defects and infirmities. It seeks
 8 compliance outside of the limits set forth in Fed. Rule Civ. P. 45(c). Additionally,
 9 service was defective. Moreover, the subpoena was not issued in good faith. It is an
 10 effort to abuse the discovery process to deanonymize an adversarial online news
 11 source and expose its users to harassment, trolling, doxing, and other forms of
 12 intimidation. The subpoena seeks irrelevant information that is protected by the First
 13 Amendment rights to anonymous speech and the privilege to shield sources. Finally,
 14 the information sought is prohibited by the Stored Communication Act which
 15 protects the subscriber information. Consequently, this Court must grant the motion
 16 to quash the subpoena.
 17

18 Dated this 7th day of June, 2018.
 19

20 Respectfully submitted,

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MOTION TO QUASH SUBPOENA-14

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